

ACQUIRING COMMERCIAL ITEMS
Federal Acquisition Regulation (FAR) Part 12
by Phil Hunter, CBDCOM¹

Hey! Why are you so slow in acquiring supplies and services by the Commercial Items (CIs) route? Well, let's get on the CI bandwagon. FAR Part 12 (hereinafter, Part 12) controls the acquisition of CIs and should be immediately reviewed and used, as appropriate.

A Commercial Item is defined² eight (8) different ways in the FAR. See Attachment 1. This kaleidoscope of definitions permits a myriad of items to qualify as CIs. A CI is, amongst other definitions:

“Any item...that is **of a type** customarily used for nongovernmental purposes and that (1) has been sold, leased, or licensed to the general public; or (2) has been offered for sale, lease, or license to the general public”.

A CI may include an item that is not yet available in the commercial marketplace but will be available in time to satisfy delivery requirements under a Government contract. CIs includes modifications to existing items, Nondevelopmental Items (NDI), installation services, maintenance services, repair services, training services, and other services. There is a “catch all” definition at paragraph (h), which allows for a combining of all definitions, to aid in an item being qualified as CI.

One very important phrase that is commonly used in the FAR to describe a CI is “**of a type**”. “*Of a type*” doesn’t mean that an item to be acquired already exists. Instead, it means that it is “of a type” that exists and can be manufactured/fabricated to satisfy a government need/requirement. Attachment 1 also defines “Nondevelopmental Item” (NDI) and “simplified acquisitions”. These two terms are integral to CIs’ acquisitions.

Governmental agencies are required to perform market research to determine whether CIs or NDI are available that could meet an agency’s requirements. Agencies are required to acquire CIs or NDIs when they are available to meet the needs of the agency. Prime contractors and subcontractors at all tiers are required to incorporate, to the maximum extent practicable, CIs and NDIs as components of items supplied to an agency.

Highlights of CIs acquisitions.

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² FAR 2.101

⟨The CI acquisition process is simple and expeditious.

⟨No dollar limits are imposed (except a \$5,000,000 limit exist if simplified procedures are used under FAR Part 13.5).

⟨Standard Form (SF) 1449 (consisting of 1 basic page) contains the minimally required information necessary to issue a solicitation and finalize a contract. It incorporates by reference most if not all required provisions and clauses, terms and conditions, etc.

⟨Some tailoring of clauses is permitted.

⟨When a policy in another part of the FAR is inconsistent with CIs acquisitions, Part 12 will take precedence³.

⟨The CI process allows months (and even years) to be shaved from acquisition cycles.

⟨Limitations. Part 12 does not apply to acquisitions of CIs: a) At or below the micro-purchase threshold (\$2500 or less); b) When Using Standard Form 44; c) When using imprest funds (\$500 or less); d) or when using the Governmentwide commercial purchase card.

The following are **special CI requirements**.

1. *Market research.* Market research must be performed before CIs can be acquired. Market research⁴ is an essential element of building an effective strategy for the acquisition of CIs and establishes the foundation for the agency description of need,⁵ the solicitation, and resulting contract.
2. *Description of agency need.* The description of agency need must contain sufficient detail for potential offerors of CIs to know which commercial products or services may be suitable. It should describe the type of product service to be acquired and explain how the agency intends to use the product or service in terms

³ FAR 12.102(c)

⁴ FAR 10.001. Techniques for conducting market research may include: Contacting knowledgeable individuals; reviewing the results of recent market research; publishing formal requests for information in technical or scientific journals or business publications; querying Government data bases; communicating with industry, acquisition personnel and customers; obtaining source lists; reviewing catalogs and product literature; conducting interchange meetings or holding presolicitation conferences, etc.

⁵ FAR Part 11

of function to be performed, performance requirement or essential physical characteristics.

3. *Solicitation, evaluation, and award.* Contracting Officers (KOs) must consider CI policies in conjunction with policies and procedures in parts 13 (Simplified Acquisition); part 14 (Sealed Bidding); or Part 15, (Contracting by Negotiation), of the FAR. The KO can use the **streamlined procedure**⁶ (combined Commerce Business Daily synopsis/solicitation) for acquisitions of CIs exceeding the simplified acquisition threshold (\$100,000) but not exceeding \$5,000,000, including options. This process allows government acquisition personnel to acquire CIs within 30 to 60 days (more or less).

4. *Solicitation/contract form.* The KO must use the Standard Form 1449, Solicitation/Contract/Order for CIs, if:

(a) the acquisition is expected to exceed the simplified acquisition threshold (\$100K)

(b) a paper solicitation or contract is being issued; and

(c) procedures at FAR 12.603 (streamlined procedure) are not being used.

The KO may allow fewer than 15 days before issuance of the solicitation.⁷

5. *Offers.* Where technical information is necessary for evaluation of offers, agencies should, as part of market research, review existing **product literature** generally available in the industry to determine its adequacy for purposes of evaluation. If adequate, KOs must request existing product literature from offerors of CIs *in lieu of unique technical proposals*.

⟨ KOs should allow offerors to propose more than one product that will meet a Government need in response to solicitations for CIs. The KO must evaluate each product as a separate offer.

⟨ The KO may allow fewer than 30 days response time for receipt of offers for CIs.⁸

⁶ FAR 12.603

⁷ FAR 5.203(a) and (h).

⁸ FAR 5.203(b) and (h).

6. *Past Performance.* Past performance must be an important element of every evaluation and award⁹.

7. *Contract Type.* Agencies must use firm-fixed price (FFP) contracts or fixed-price contracts with economic price adjustment (FPWEPA). Indefinite Delivery¹⁰ contracts may be used where the prices are established based on a FFP or FPWEPA. *Use of any other type to acquire CIs is prohibited.*

8. *Quality Assurance.* Unless customary market practices for the CI being acquired include in-process inspection, contracts for CI must rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance. All in-process inspection by the Government must be conducted in a manner consistent with commercial practice.

9. *Price reasonableness.* When contracting by negotiation for CIs, the policies and procedures in Far Subpart 15.4 will apply.

10. *Contract financing.* The KO may offer Government financing in accordance with the policies and procedures in FAR Part 32.

11. *Technical Data.* Except as provided by agency-specific statutes, the Government will acquire only the technical data and the rights in that data customarily provided to the public with a CI or process.

12. *Computer software.* Commercial computer software or commercial computer software documentation will be acquired under licenses customarily provided to the public, to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs.

13. *Other commercial practices.* Commercial terms and practices may be incorporated into the solicitation and contract if the KO determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or Executive Order.

14. *Cost Accounting Standards (CAS).* CAS generally will not apply to CIs.

The following minimum provisions and clauses should be included when acquiring CIs:

⁹ See FAR Subpart 9.1; 13.106; or 15.3, as applicable

¹⁰ FAR 16.5

- < 52.212-1, Instructions to Offerors—Commercial Items.
- < 52.212-3, Offeror Representations and Certifications—Commercial Items.
- < 52.212-4, Contract Terms and Conditions—Commercial Items.
- < 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (attach to solicitation and contract)

< **When using evaluation factors, insert:**

- < 52.212-2, Evaluation—Commercial Items.¹¹ Include a similar provision containing all evaluation factors required by FAR 13.106, Subpart 14.2 or Subpart 15.3, as an addendum (see 12.302(d)).

The KO may include other FAR provisions and clauses in solicitations and contracts **by addendum** when their use is consistent with the limitations contained in FAR 12.302. For example, the clauses prescribed at FAR 16.505 may be used for an indefinite- delivery type of contract; while FAR 17.208, should be consulted when option(s) are possible.

- < **Warranties**¹². Warranties must be considered in all CI acquisitions. Warranties are either implied or expressed.

< Implied Warranties.

The Government's post award rights contained in 52.212-4, are the *implied warranty of merchantability*, the *implied warranty of fitness for particular purpose* and the remedies contained in the acceptance paragraph. The *implied warranty of merchantability* provides that an item is reasonably fit for the ordinary purposes for which such items are used. The items must be of at least average, fair or medium-grade quality, and must be comparable in quality to those that will pass without objection the trade or market for items of the same description.

The *implied warranty of fitness for a particular purpose* provides that an item is fit for use for the particular purpose for which the Government will use the item.

¹¹ FAR 12.602

¹² FAR 12.404

- ⟨ Express Warranties.
 - ⟨ KOs must take advantage of express commercial warranties. To the maximum extent practicable, solicitations for commercial items shall require offerors to offer the Government at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice.
 - ⟨ Express warranties must be included in the contract by addendum¹³.

The following laws are not applicable to executive agency contracts for the acquisition of CIs.¹⁴ Laws not applicable to subcontracts are found at FAR 12.504.

- ⟨ Wash-Healey Act
- ⟨ Contingent Fees
- ⟨ Minimum Response Time for Offers under Office of Federal Procurement Policy Act
- ⟨ Drug-Free Workplace Act of 1988
- ⟨ Requirement for a clause under the Federal Water Pollution Control Act
- ⟨ Requirement for a certificate and clause under the Contract Work Hours and Safety Standards Act
- ⟨ Requirement for a clause and certain other requirements related to the Anti-Kickback Act of 1986.
- ⟨ Requirement for a certificate and clause under the Clean Air Act
- ⟨ Requirement for a certificate and clause under the Fly American Provisions.

The below streamlined procedures can be followed when offers¹⁵ are **solicited and evaluated**.

- ⟨ *When evaluation factors are used*, the KO may insert a provision substantially the same as the provision at 52.212-2, Evaluation—Commercial Items, in solicitations for CIs or comply with the procedure in FAR 13.106, if the acquisition is being made using simplified acquisition procedures.

¹³ FAR 12.302

¹⁴ FAR 12.503

¹⁵ FAR 12.602

- ⟨ When the provision at 52.212-2 is used, paragraph (a) of the provision must be tailored to the specific acquisition to describe the evaluation factors and *relative importance* of those factors.
- ⟨ When using the simplified acquisition procedures in part 13, KOs are not required to describe the relative importance of evaluation factors.
- ⟨ Offers must be evaluated in accordance with the criteria contained in the solicitation. For many CIs, the criteria need not be more detailed than technical (capability of the item offered to meet the agency need), price and past performance. Technical capability may be evaluated by how well the proposed products meet the Government requirement instead of predetermined subfactors. Solicitations for CIs do not have to contain subfactors for technical capability when the solicitation adequately describes the item's intended use.
- ⟨ A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features and warranty provisions.
- ⟨ Select the offer that is most advantageous to the Government based on the factors contained in the solicitation. Fully document the rationale for selection of the successful offeror including discussion of any tradeoffs considered.
- ⟨ Streamlined solicitation for Commercial Items.
 - ⟨ When a written solicitation will be issued, the KO can reduce the time required to solicit and award by combining the Commerce Business Daily (CBD) notice with issuance of the solicitation into a single document¹⁶:
 - ⟨ The solicitation and notice is limited to a maximum of 12,000 textual characters (approximately 3 _ single-spaced pages).
 - ⟨ Use when the solicitation is relatively simple. It is not recommended when lengthy addenda to the solicitation is necessary.
 - ⟨ When employing the combined synopsis/solicitation procedure, the SF 1449 is not utilized. See FAR 12.603(c) for additional details.

¹⁶ FAR 12.603(a)

CONCLUSION

In order to expedite the acquisition of CIs, Part 12 of the FAR is available for immediate utilization. CIs acquisitions requires minimal provisions and clauses in the solicitation/contract. The SF 1449 (consisting of one page) is used in CIs' acquisitions and it simplifies the process. Part 12 takes precedent over other chapters of the FAR relative to CI acquisitions. There is no dollar limit to CI acquisitions. It is in the government's best interest for acquisition personnel to take full advantage of this relative new acquisition tool because it is designed to save the Government both time and money.